SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 398

THOR-DAHL A/S

Petitioner,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA SECOND APPELLATE DISTRICT

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TOPICAL INDEX

	Page
Citations to opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and regulations involved	3
Statement of the case	3
Reasons for granting the writ	5
A. The importance of this case	5
B. The questions presented have not heretofore been determined by this Court	7
C. The decision of the Court below is erroneous	8
Conclusion	11

APPENDICES

A	Opinion of the Court of Appeal, Second Appellate District, State of California, Division One, filed February 27, 1967	12

Statutes and Regulations

B	Public Law 85-742, 72 Stat. 835, 33 USC 941, et seq.	24

TABLE OF AUTHORITIES CITED

Cases

Crumady vs. JOCHIM HENDRICK FISSER, 358 U.S. 423 8

Ignatyuk vs. Tramp Chartering Corp., 250 F.2d 198 (2nd Cir. 1957) 5

Italia Societa vs. Oregon Stevedoring Co., 376 U.S. 313 7

Kernan vs. American Dredging Co., 355 U.S. 426 9

Lilly vs. Grand Trunk Western R. Co., 317 U.S. 481 9

Provenza vs. American Export Lines, Inc., 324 F.2d 660 (4th Cir. 1963) 9

Ryan Stevedoring Co. vs. Pan-Atlantic S.S. Co., 350 U.S. 124 7

Thor-Dahl A/S vs. Crescent Wharf & Warehouse Company, 66 A.C. No. 8, Minutes 4 (1967) 1

Thor-Dahl A/S vs. Crescent Wharf & Warehouse Company, 248 A.C.A. 1045 (1967) 1

Urie vs. Thompson, 337 U.S. 163 9

Weyerhaeuser S.S. Co. vs. Nacirema Operating Co., 335 U.S. 563 7

Statutes

Longshoremen's and Harbor Workers' Compensation Act 5, 7, 10
Section 41 ..... 2, 8

Public Law 85-742, 72 Stat. 835, 33 USC Sec. 941, et seq 2, 3

United States Codes
Title 28, Section 1257(3) 2
Title 33, Section 941 2

Miscellaneous

Page

29 Code of Federal Regulations (The Safety and Health Regulations for Longshoring), effective March 21, 1960 ..... 2, 3, 5, 7

Sub-title A, Part 9 ..... 2, 3

Section 9.2(a) 2, 9

Section 9.3(c) 2, 9

Section 9.52(b)(3) 2, 3, 4, 6, 8, 9

29 Code of Federal Regulations (The Safety and Health Regulations for Longshoring), effective June 20, 1966

Chapter XIII, Part 1504, Section 1504.52(b)(3) 9

U.S. Code Congressional & Administrative News, 85th Congress, 2nd Session

Vol. 2, page 3844 ..... 2, 6

Vol. 2, page 3845 6

IN THE

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October Term, 1966

No. .....

THOR-DAHL A/S

Petitioner,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES

THOR-DAHL A/S respectfully prays that a Writ of Certiorari issue to review that part of the final judgment of the Supreme Court of the State of California entered April 26, 1967, in favor of Crescent Wharf & Warehouse Company, a stevedoring company, and against THOR-DAHL A/S, a shipowner.

CITATIONS TO OPINIONS BELOW

The Order of the Supreme Court of California entered on April 26, 1967, denying hearing is reported at 66 A.C. No. 8, Minutes 4 (1967) and is set forth in the Certified Record filed herewith. The Opinion of the California District Court of Appeal, Second Appellate District, Division I, is reported at 248 A.C.A. 1045 (1967) and is printed as Appendix A hereto.

JURISDICTION

The Order of the California Supreme Court denying Petition for Hearing was entered on April 26, 1967. The jurisdiction of this Court is invoked under 28 USC §1257 (3) and 33 USC 941.

QUESTIONS PRESENTED

In 1958, Congress passed Public Law 85-742, 72 Stat. 835, 33 USC §941 et seq. The purpose of this Legislation was to amend Section 41 of the Longshoremen's and Harbor Workers' Compensation Act so as "to provide a system of safety rules, regulations and safety inspection and training, and authorize their enforcement by the Secretary of Labor."[1] Pursuant to this legislation, the Secretary of Labor promulgated The Safety and Health Regulations for Longshoring.[2] Responsibility for compliance with this regulation is placed upon the stevedoring company as the employer of longshoremen.[3]

The questions presented by this case are as follows:

1. Do The Safety and Health Regulations for Longshoring, promulgated by the Secretary of Labor pursuant to an Act of Congress, impose absolute standards of care upon a stevedoring company the violation of which con-

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[1] U.S. Code Cong. & Ad. News, 85th Congress, Second Session, Vol. 2, page 3844.

[2] Part 9 to Sub-title A of 29 Code of Federal Regulations, effective March 21, 1960. See Appendix B, *infra*, p. 29.

[3] Safety and Health Regulations for Longshoring §§ 9.2(a) and 9.3(c). See Appendix B, *infra*, p. 31.

stitutes a breach of the stevedoring company's warranty of workmanlike service?

2. May a trial court in instructing a jury in an action for indemnity against a stevedoring company qualify the absolute standards of the Safety Regulations so as to require of the stevedoring company a lesser duty than that established by the Safety Regulations?

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are Public Law 85-742, 72 Stat. 835, 33 USC, 941 et seq. and The Safety and Health Regulations for Longshoring, Part 9 to Subtitle A of 29 Code of Federal Regulations. Pertinent parts are printed as Appendix B hereto.

STATEMENT OF THE CASE

On December 13, 1961, a well-established, experienced stevedoring company, Crescent Wharf and Warehouse Company, was aboard Petitioner's vessel THORSISLE to perform its specialized service of working cargo. In the course of making its customary test to determine if a stopper clamp was properly gripping the topping lift cable which held the #3 boom in the elevated position, the stevedoring company dropped the boom, injuring its employee, plaintiff longshoreman.

After the accident, a build-up of paint and grease was found on the faces of the stopper clamp. Apparently, the paint and grease prevented the stopper from holding tight the cable. To inspect the stopper, the stevedore company looked at the outside of the stopper without opening the clamps and then tested to see if the stopper

was holding by surging or easing the cable to place the strain on the stopper while the cable was still in place on the deck cleats. It was while the cable was being surged on the cleats that it got away from the stevedore company and the boom was dropped.

On February 4, 1963, plaintiff filed his Complaint for Damages for Personal Injuries.[4] With its Answer, defendant filed a Cross-Complaint against Crescent Wharf & Warehouse Company.[5]

The case was tried before a jury in the Superior Court of the State of California for the County of Los Angeles, before the Honorable John Stuart Frazer on July 12, 1965. On July 21, 1965, the jury returned a verdict for plaintiff Flores and against defendant shipowner. On the Cross-Complaint, the jury found for cross-defendant stevedoring company and against cross-complainant shipowner.[6]

In view of Section 9.52(b)(3) of The Safety and Health Regulations For Longshoring in effect at the time of the accident, Petitioner objected[7] to the following jury instruction:

> "You have been instructed that the stevedore company owes a duty to the shipowner to discharge the vessel, through the exercise of ordinary care,

[4] C.Tr. 1.

[5] C.Tr. 7, 11.

[6] C.Tr. 18.

[7] R.Tr. 769. Section 9.52(b)(3) provided: "When used, patent stoppers of the clamp type shall be suited to the size of the rope used. Clamps shall be in good condition and free of paint and dirt which would prevent their being drawn tight."

in a reasonably safe manner. However, the stevedore company does not have a duty to discover and remedy a hidden or latent defect of which it was not informed and which was not obvious upon a cursory inspection."[8]

The District Court of Appeal approved the aforesaid jury instruction and, relying on the Second Circuit Court of Appeal's decisions in *Ignatyuk vs. Tramp Chartering Corp.*, 250 F.2d 198 (2nd Cir. 1957), ruled that a cursory inspection of the stopper is all the law requires of a stevedore. In its Opinion, the Court noted that the stevedore company may be held liable for indemnity only for defects in the ship's gear ". . . which have been in fact observed by the stevedore company . . . ."[9]

In its Order entered April 26, 1967, the California Supreme Court denied shipowner's petition for hearing.[10]

REASONS FOR GRANTING THE WRIT

A. The Importance of This Case.

The question presented in this case is of critical importance to the administration of the Longshoremen's and Harbor Workers' Safety Program, of which the Longshoremen's and Harbor Workers' Compensation Act and The Safety and Health Regulations for Longshoring are an integral part.

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[8] R.Tr. 706.

[9] Appendix A, *infra*, p. 11.

[10] 66 A.C. No. 8, Minutes 4 (1967). The Order is set forth in the Certified Record filed herewith.

The Committee on Education and Labor in the 82nd, 83rd and 84th Congresses found that effective safety rules were badly needed in the longshoring industry.[11] The Committee concluded that the Secretary of Labor should be given authority to promulgate and enforce necessary safety standards.[12] The need for such standards was evidenced by hearings held before the Subcommittee on Safety and Compensation during the 85th Congress, when it was brought out that stevedoring is the most hazardous of all industries which report their experience to the Bureau of Labor Statistics. The Bureau reported an injury frequency rate of 88.5 disabling injuries per million man-hours worked. This is seven times the rate in manufacturing activities.[13]

At issue in this case is whether the stevedoring company, the party best situated to reduce the rate of injuries among longshoremen, shall be held responsible for its failure to strictly comply with regulations passed by the Secretary of Labor when its non-compliance results in an accident to a longshoreman employed by it and under its supervision. The proper construction of Section 9.52(b)(3) of these regulations must also be determined.

Settlement of these questions by the Court is of significant public interest, since they are likely to be presented

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[11] U.S. Code Cong. & Ad. News, 85th Congress, 2nd Session, Vol. 2, p. 3845.

[12] *Ibid.*

[13] *Ibid.*

in many cases in which a longshoreman sues the shipowner and the shipowner in turn seeks indemnity from the longshoreman's employer, the stevedore company.

The stevedore's warranty of workmanlike service is a judicial creation, the nature and extent of which have been carefully developed by this Court.[14] Until now, the Court has not declared what effect The Safety and Health Regulations for Longshoring have on the stevedore's warranty of workmanlike service. A declaration at this time by the Court will not only clarify this area of maritime law, but will also implement the enforcement of the Longshoremen's and Harbor Workers' Compensation Act as intended by Congress.

B. The Questions Presented Have Not Heretofore Been Determined By This Court.

In its landmark decision in *Ryan Stevedoring Co. vs. Pan-Atlantic S.S. Corp., supra,* this Court imposed upon the stevedoring company an implied warranty of workmanlike service. Decisions subsequent to *Ryan* have made it clear that the stevedore's obligation to perform with reasonable safety extends not only to the stowage and handling of cargo, but also to the use of equipment incidental thereto,[15] including defective equipment sup-

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[14] See *Ryan Stevedoring Co. vs. Pan-Atlantic S.S. Corp.*, 350 U.S. 124; *Weyerhaeuser S.S. Co. vs. Nacirema Operating Co., Inc.*, 355 U.S. 563; *Italia Societa vs. Oregon Stevedoring Co., Inc.*, 376 U.S. 315.

[15] *Weyerhaeuser S.S. Co. vs. Nacirema Operating Co., Inc., supra.*

plied by the shipowner.[16] However, the Court has not yet established whether non-compliance with a safety regulation duly promulgated by the Secretary of Labor constitutes such a breach of warranty. An important part of this question, and critical to this case, is whether Section 9.52(b)(3) of The Safety and Health Regulations for Longshoring should be interpreted as requiring clamps "in good condition and free of paint and dirt which would prevent their being drawn tight", or whether it should be construed to simply impose on the stevedoring company the obligation to make a "cursory inspection" of the outside of the clamps to determine whether this requirement is met.[17] None of these questions have previously been determined by this Court.

C. The Decision of the Court Below is Erroneous.

The decision of the Court below is contrary to well-established principles recognized by this Court as well as by other courts. It is also clearly inconsistent with the Congressional purpose of Section 41 of the Longshoremen's and Harbor Workers' Compensation Act which provides safety regulations for longshoring.

Section 9.52(b)(3) of The Safety and Health Regulations effective at the time of plaintiff's accident clearly provides that "clamps shall be in good condition and free

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[16] *Crumady vs. JOACHIM HENDRIK FISSER*, 358 U.S. 423.

[17] As discussed on page 4 of Appellant's Petition For Hearing in the California Supreme Court, set forth in the Certified Record filed herewith, the only method of ascertaining whether the stopper is free of paint and dirt is to back off a butterfly nut several turns, swing open the clamp, and examine the faces of the clamp.

of paint and dirt which would prevent their being drawn tight."[18] Sections 9.2(a) and 9.3(c) place responsibility for compliance with this regulation on the stevedoring company.

It is well settled, and this Court has declared, that a federal regulation promulgated under authority duly granted by Congress has the force of a federal statute.[19]

In *Provenza vs. American Export Lines, Inc.*, 324 F.2d 660 (4th Cir. 1963), the Court of Appeals for the Fourth Circuit indicated that it was error for the court to refuse to instruct the jury as to definite safety standards set up by regulations promulgated by the Secretary of Labor. The Court noted that if the stevedoring company violated the regulations established by the Secretary of Labor, such conduct on its part could constitute negligence. 324 F.2d at 665.

Although it has not been expressly decided, it would appear clear from the *Provenza* case and also from this Court's decision in *Kernan vs. American Dredging Co., supra,* that a violation of safety regulations by the stevedoring company would constitute a breach of its warranty of workmanlike service. The District Court of Appeal either disregarded these cases or overlooked them.

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[18] Under the most recently promulgated Regulations, effective June 20, 1966, Section 9.52(b) (3) remains unchanged. It is now Section 1504.52(b)(3) of Part 1504 to Chapter XIII of Title 29.

[19] *Kernan vs. American Dredging Co.*, 355 U.S. 426. See also *Urie vs. Thompson*, 337 U.S. 163; *Lilly vs. Grand Trunk Western R. Co.*, 317 U.S. 481.

Petitioner does not dispute that the authorities relied on by the court below state the general rule that, in the absence of applicable federal statutes or special circumstances, the stevedore is not obligated to discover defects which are not obvious upon a cursory inspection. However, where a regulation having the force of federal statute requires the *use* of, and not merely an inspection for, *clean and workable* stopper clamps, then the general rule cannot be applied. The court below failed to give cognizance to the regulation as placing an absolute duty on the stevedore to use clamps that are, in fact, safe. Under the regulation, it is not sufficient that the clamps, upon a cursory inspection, *appear* to be safe.

Prior to the enactment of the Longshoremen's and Harbor Workers' Compensation Act and the regulations promulgated thereunder, what constituted breach of the stevedore's warranty of workmanlike service was to be determined by the jury under definitions established by the courts. Now, with respect to longshoring, and specifically as to the stevedore's use of stopper clamps, the statutory law of the United States has laid down definite standards. The courts below have committed prejudicial error in disregarding these standards.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

July 18, 1967

Respectfully submitted,

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KENNETH R. CHIATE

APPENDIX A

In the Court of Appeal

of the State of California

SECOND APPELLATE DISTRICT

DIVISION ONE

ARTHUR FLORES,
Plaintiff and Respondent,
- vs -
PACIFIC ISLAND TRANSPORT LINES, et al.,
Defendants and Appellants,
and
CRESCENT WHARF & WAREHOUSE COMPANY,
Cross-Defendant and Respondent.

CIV. NO. 30728

Court of Appeal
Second Dist.
FILED
FEB 27 1967
Clay Robbins, Jr.
Clerk

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Deputy Clerk

APPEAL from judgment of the Superior Court of Los Angeles County. John Stuart Frazer, Judge.

Counsel for Appellants: Lillick, Geary, McHose & Roethke, and Lawrence D. Bradley, Jr.

Counsel for Respondent *Arthur Flores*: Magana, Olney, Levy and Cathcart, Mitchell Levy, Ellis J. Horvitz and Morton Minikes.

Counsel for Cross-defendant and Respondent *Crescent Wharf & Warehouse Company*: Sikes, Pinney & Matthew, and John Scott Matthew.

This action was instituted by longshoreman Arthur Flores (hereinafter called Flores) against ship's owner Thor-Dahl A/S (hereinafter called Thor-Dahl) for damages for personal injuries suffered when, in the course of his employment by Crescent Wharf & Warehouse Company (hereinafter called Crescent), Flores was engaged in unloading the vessel Thorsisle. Thor-Dahl filed a cross-complaint for indemnity against Crescent and the jury returned a verdict of $78,850 in favor of Flores but denied indemnity to Thor-Dahl; judgment was entered accordingly. Because the accident was sustained by a longshoreman aboard a seagoing vessel, this action is controlled by federal maritime law in both its substantive and its procedural aspects. (*Vittone v. American President Lines*, 228 Cal.App.2d 689, 693; *Kermarec v. Transatlantique*, 358 U.S. 625; *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409.)

Appellant Thor-Dahl contends that the jury was improperly instructed concerning the nature and extent of Crescent's duty as a stevedore company under contract to unload Thorsisle with respect to its implied warranty of workmanlike service. It is Thor-Dahl's further contention that this instruction adversely influenced the jury in its deliberations on the issue of damages as evidenced by the fact that it failed to reduce the award to accommodate for the contributory negligence of Flores. The pivotal issue herein is the extent of the responsibility owed by the stevedore company and its employee to discover and remedy latent defects in the ship's equipment, unknown to the vessel's crew or the stevedore company beforehand.

The vessel Thorsisle was a Norwegian ship owned and operated by Thor-Dahl and engaged in carrying cargo and passengers between ports on the west coast of the United States and islands in the South Pacific. Flores was 34 years old and had, at the time of the accident, about seven years' experience in all phases of work as a longshoreman. When he reported to the longshoremen's Union Hall for a work assignment on December 13, 1961, he was dispatched to the employ of Crescent to assist as a winch-driver in unloading the Thorsisle. According to custom, he reported to the hatch boss at the vessel, and was assigned to one of the winches to perform familiar duties. His first task in preparation for the unloading operation was to lower the yard boom from the upright position in which the ship's crew had previously placed it.

The boom is fitted with a topping lift cable which raises the boom from the cradle in which it rests while the vessel is at sea and holds it in an elevated position in anticipation of its use in port. When the boom is so elevated, the topping lift cable is wrapped in a few circles and then in figure eights around cleats on the deck floor to keep the cable taut. In order to lower the boom by means of the winch the topping lift cable must be transferred from the cleats to the gypsy head of the winch. Since there is always a strain on the topping lift cable whenever the boom is out of its cradle, a stopper is provided at each boom to hold the topping lift cable temporarily in place while the cable is transferred from the gypsy head to the cleats or vice versa. These stoppers may be clamp-type, as were those on the Thorsisle,

with the two halves hinged at one end, a wing or butterfly nut at the other end, and a rifled groove down the middle of each clamp face so that when the topping lift cable is in place it fits snugly into the groove.

Topping lift cables are comparatively heavy, stiff cables with a natural tendency to spring off the cleats so the man handling the cable must, as a precaution, hold the cable taut throughout the transfer from cleats to gypsy head. Moreover, there is always the possibility that the topping lift cable will not be held firmly by the rifling in the groove of the stopper and the man who lowers the boom must test the stopper. There is no test or inspection that can be made beforehand to determine that the stopper will hold the cable once it is undone from the cleats. Instead, the stopper is tested in use by placing the cable in the stopper, then tightening the stopper by turning the butterfly lever, thereafter removing the figure eights from the cleats, and finally loosening or "surging" the cable slightly into the stopper to see if it holds. If the stopper holds properly, the topping lift cable is taken off the cleats and transferred to the gypsy head and the boom is lowered by means of the winch. In the event the stopper fails to hold, the longshoreman must pull hard on the cable and attempt to return the figure eights to the cleats. The longshoreman who performs this operation must work alone up to the point where the cable has been transferred to the winch.

In the instant case, Flores testified that he tightened the stopper by turning the butterfly lever as hard as he could until the faces of the stopper appeared to be pressing tightly against the cable and then proceeded to

remove the small line which is tied about the cleats above the figure eights to secure the cable. He thereafter removed the figure eights of cable from the cleats and surged the cable to make sure the stopper would hold, but the stopper did not hold and the cable started to run rapidly through the stopper. Flores tried to stop the running cable by pulling back hard, but because of the limited work area he could not gain the necessary leverage and, as he could not prevent his hands from being drawn to the cleats, he let go of the cable which started to snake in and out and finally hit him, throwing him to the deck of the ship. He testified that he had time in the instant before he fell to notice that the butterfly lever on the stopper was spinning backwards.

Some five or ten minutes after the accident one of Flores' fellow longshoremen aboard the Thorsisle examined the stopper clamp and observed that the inside face of the clamps had a build-up of paint drippings about a quarter of an inch thick and a substantial accumulation of heavy grease and paint chips but when he looked later the same day these faces had been scraped free of the excess paint and grease. Subsequent testimony of this witness and the ship's then chief officer established that the accumulation of paint and grease on the inside face of stopper clamps aboard a vessel is a recognized maritime hazard and one that the ship's crew customarily takes precaution to avoid because this prevents the stopper from holding well.

Flores suffered, as a result of the accident, a severe compound fracture of his leg which required emergency surgery in which a plate and four screws were inserted

to hold his leg straight. The plate was later removed and a metal pin inserted across the fracture while, at the same time, grafts were made of bone from Flores' other hip to encourage new bone formation. Finally, after spending some 22 months in a hip length cast, Flores was able to return to work in a limited capacity with some attendant pain and difficulty.

In maritime cases the rule of comparative negligence applies, and Thor-Dahl claims that a new trial should be granted because the jury did not reduce the amount of the award to reflect the alleged contributory negligence of Flores, thus rendering the verdict excessive as a matter of law. The jury was justified in concluding, however, from substantial evidence at the trial, that Flores' negligence, if any, was not a contributing factor in the accident.

Flores testified that before he tested the stopper he inspected it visually without opening the clamps and observed nothing wrong with it. He further testified that the work area, which was only 18 inches wide, seemed small but, though he had frequently performed the stopper test before, he had never experienced a stopper failure and did not realize the significance of or report this space inadequacy. Since the evidence amply sustains the inference that the unseaworthy stopper condition caused the accident, and the ship owes to both seamen and longshoremen employed about the vessel an absolute duty to maintain for their use appropriate and seaworthy equipment (*Seas Shipping Co. v. Sieracki*, 328 U.S. 85), the jury was justified in its implied finding that even if Flores were in some way negligent, his conduct did not

constitute a proximate cause of the accident. As appellant concedes, there is nothing specific in the record from which it can be determined whether or not the jury found Flores contributorily negligent, and appellant presumes merely that since provable damages were substantially lower than the verdict, the jury failed to apply the court's instruction to reduce them in proportion to Flores' negligence.

We perceive no sound basis for appellant's assumption that the jury defected in its responsibility to consider Flores' comparative negligence, if any, or to segregate as directed the instructions given by the court and apply only those appropriate in resolving the respective issues. We are not impressed with appellant's premise that the amount of the award, in and of itself, discloses a misapplication of law by the jury.

We find herein, moreover, no miscarriage of justice with respect to the jury's verdict that Thor-Dahl is not entitled to indemnity. The United States Supreme Court, in a landmark decision (*Ryan Co. v. Pre-Atlantic Corp.*, 350 U.S. 124), imposed upon stevedoring companies generally an implied warranty of workmanlike service and the liability of Crescent must be determined in this contest. The jury was, nonetheless, justified in inferring from the evidence either that no breach thereof occurred or that, in any event, defective performance by Crescent did not proximately cause the accident.

Testimony disclosed that the custom and practice among San Diego longshoremen at the time of the accident was to make a visual inspection of the ship's gear and proceed to use it if it appeared to be in good con-

dition without first taking it apart or examining it for hidden or latent defects. This accords with Flores' testimony that he observed no gross defects in the stopper before its use. The law would impose an untoward burden on the stevedore company to require that its employees dismantle and inspect the ship's equipment for latent defects prior to use.

Appellant refers to rule 9.52(b)(3) of the Safety and Health Regulations for Longshoring (Code of Federal Regulations, volume 29, part 9 to sub-title A, effective March 21, 1960, and in force at the time of the accident) which provides that stopper clamps shall not be used unless they appear to be in good condition and free of paint and dirt which would prevent their being drawn tight, but we have been referred to no decision which has interpreted this regulation to impose on the stevedore company the duty to discover this condition by taking the clamps apart.

Appellant observes that the shipowner's breach of its duty to maintain a seaworthy vessel no longer constitutes an absolute bar to indemnity from the stevedore company. Decisions subsequent to *Ryan* ". . . have made clear that the stevedore's obligation to perform with reasonable safety extends not only to the stowage and handling of cargo but also to the use of equipment incidental thereto, Weyerhaeuser S.S. co. v. Nacirema Operating Co., 335 U.S. 563, 78 S.Ct. 438, including defective equipment supplied by the shipowner, Crumady v. The J. H. Fisser, supra, cf. Waterman S.S. Corp. v. Dugan & McNamara, Inc., 364 U.S. 421, 5 L.ed.2d 169, 81 S Ct 200, and that the shipowner's negligence is

not fatal to recovery against the stevedore." (*Italia Societa v. Oregon Stevedoring Co., Inc.*, 376 U.S. 315, 319-320.)

The shipowner is entitled to relief where the stevedore company induces the accident by bringing into play the hazardous condition (*Crumady v. "Jochim Hendrick Fisser"*, 358 U.S. 423; *Weyerhaeuser S.S. Co. v. Nacirema Co.*, 355 U.S. 563; *Pettus v. Grace Line, Inc.*, 305 F.2d 151) The application of this principle is, however, limited to circumstances where the stevedore company knew and recognized the existence of the defective condition, and the use of unseaworthy equipment despite such knowledge constituted the fatal breach. (*Crumady v. "Jochim Hendrick Fisser", supra; Matson Terminals, Inc. v. Caldwell*, 354 F.2d 681.) We have been referred to no decision which extended protection to the shipowner when the latent defect was unknown to both the shipowner and the stevedore company. The evidence, moreover, does not command the inference that the stevedore company in the reasonable and workmanlike performance of its services should have discovered this dangerous latent condition prior to the operational test of the stopper. Appellant concedes that "there is no other conceivable way (except by taking apart the stopper) in which the stevedore company could . . . make certain the stopper was free of paint and dirt which would prevent it from being drawn tight," but urges that a breach of workmanlike service may be presumed from the mere fact that an accident resulted in the performance of the customary test. Even if we agreed, we would not be entitled to thus invade the province of the jury.

In this regard appellant complains of the following instruction, clearly limited in applicability to the case for indemnity against the stevedore company: "You have been instructed that the stevedore company owes a duty to the shipowner to conduct its operations, through the exercise of ordinary care, in a reasonably safe manner.'

"However, the stevedore company does not have a duty to the ship to discover and remedy a hidden or latent defect of which it was not informed and which is not obvious upon cursory inspection." Appellant strongly objects to the adjective "cursory" as inadequate to describe the duty of inspection which the stevedore company bears under its contractual relationship with the shipowner. The selected language taken out of context may imply a superficial inspection generally inappropriate to circumstances so fraught with potential hazard as the unloading of a ship's heavy cargo but this does not compel the conclusion that any miscarriage of justice occurred in the trial. This terminology is, moreover, supported by at least two recent decisions of the United States Court of Appeals. "We hold that an implied warranty of workmanlike performance by a stevedore does not place upon him a duty to discover defects in the apparatus or equipment furnished by the vessel being loaded or unloaded which are not obvious upon a cursory inspection." (*Ignatyuk v. Tramp Chartering Corp.*, 250 F.2d 198, 201; relied upon in *Cia Maritima Del Nervion v. James J. Flanagan Ship. Corp.*, 308 F.2d 120.)

The accident resulted from a hazardous and latent unseaworthy condition of the vessel, which it is the shipowner's responsibility to maintain. While the negligence

of the shipowner may not bar its recovery from the stevedore company (*Italia Societa per Azioni de Navigazione v. Oregon Stevedoring Co., supra,* 376 U.S. 315) still the stevedore company should not be charged on its warranty by reason of failure to make a cautious inspection of the ship's gear (*Cia Maritima Del Nervion v. James J. Flanagan Ship. Corp., supra,* 308 F.2d 120). It is only those defects which have been in fact observed by the stevedore company for which it may be responsible if it uses the equipment thereafter without ascertaining that the condition has been remedied. (*T. Smith & Son, Inc. v. Skibs A/S Hassel,* 362 F.2d 745.)

We are compelled to conclude that the language of the court in *Ignatyuk v. Tramp Chartering Corp., supra,* describes the duty of the stevedore company with sufficient accuracy from a practical perspective. This is true for the significant reason that any inspection which would impose upon the stevedore the duty to dismantle the ship's gear would be impractical and prohibitive in cost to the shipowner itself.

" 'Certainly the shipowner would not only object but would prohibit the dismantling of every piece of ship's gear, such as winches, lights, etc. in a professed effort by the stevedoring company to ascertain whether or not the ship's own appurtenances were seaworthy.' *Ray v. Compania Naviera Continental, S.A.,* D.Md. 1962, 203

F. Supp. 206, 211." (*Cia Maritima Del Nervion v. James J. Flanagan Ship. Corp., supra,* p. 125.)

The judgment is affirmed.

FOURT, J.

We concur:

WOOD, P. J.

LILLIE, J.

APPENDIX B

STATUTES AND REGULATIONS

Public Law 85-742, 72 Stat. 835, 33 USC 941 et seq.:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Section 41 of the Longshoremen's and Harbor Workers' Compensation Act (ch. 509, 44 Stat. 1424), as amended, is amended to read as follows:

"Sec. 41. (a) Every employer shall furnish and maintain employment and places of employment which shall be reasonably safe for his employees in all employments covered by this Act and shall install, furnish, maintain, and use such devices and safeguards with particular reference to equipment used by and working conditions established by such employers as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health, and safety of such employees, and to render safe such employment and places of employment, and to prevent injury to his employees. However, the Secretary may not make determinations by regulation or order under this section as to matters within the scope of title 52 of the Revised Statutes and Acts supplementary or amendatory thereto, the Act of June 15, 1917 (ch. 30, 40 Stat. 220), as amended, or section 4(e) of the Act of August 7, 1953 (ch. 345, 67 Stat. 462), as amended.

"(b) The Secretary, in enforcing and administering the provisions of this section, is authorized in addition to such other powers and duties as are conferred upon him —

"(1) to make studies and investigations with respect to safety provisions and the causes and prevention of injuries in employments covered by this Act and from time to time make to Congress such recommendations as he may deem proper as to the best means of preventing such injuries, and in making such studies and investigations to cooperate with any agency of the United States or with any State agency engaged in similar work;

"(2) to utilize the services of any agency of the United States or any state agency engaged in similar work (with the consent of such agency) in connection with the administration of this section;

"(3) to promote uniformity in safety standards in employments covered by this Act through cooperative action with any agency of the United States or with any State agency engaged in similar work;

"(4) to provide for the establishment and supervision of programs for the education and training of employers and employees in the recognition, avoidance, and prevention of unsafe working conditions in employments covered by this Act, and to consult with and advise employers as to the best means of preventing injuries;

"(5) to hold such hearings, issue such orders, and make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this section, and for such purposes the Secretary and the district courts shall have the authority and jurisdiction provided by section 5 of the Act of June 30, 1936 (ch. 881, 49 Stat. 2036), as amended, and the Secretary shall be represented in any court proceedings as provided in the Act of May 4, 1928 (ch. 502, 45 Stat. 490), as amended.

"(c) The Secretary or his authorized representative may inspect such places of employment, question such employees, and investigate such conditions, practices, or matters in connection with employment subject to this Act, as he may deem appropriate to determine whether any person has violated any provision of this section, or any rule or regulation issued thereunder, or which may aid in the enforcement of the provisions of this section. No employer or other person shall refuse to admit the Secretary or his authorized representatives to any such place or shall refuse to permit any such inspection.

"(d) Any employer may request the advice of the Secretary or his authorized representative, in complying with the requirements of any rule or regulation adopted to carry out the provisions of this section. In case of practical difficulties or unnecessary hardships, the Secretary in his discretion may grant variations from any such rule or regulation, or particular provisions thereof, and permit the use of other or different devices if he finds that

the purpose of the rule or regulation will be observed by the variation and the safety of employees will be equally secured thereby. Any person affected by such rule or regulation, or his agent, may request the Secretary to grant such variation, stating in writing the grounds on which his request is based. Any authorization by the Secretary of a variation shall be in writing, shall describe the conditions under which the variation shall be permitted, and shall be published as provided in section 3 of the Administrative Procedure Act (ch. 324, 60 Stat. 237), as amended. A properly indexed record of all variations shall be kept in the office of the Secretary and open to public inspection.

"(e) The United States district courts, together with the District Court for the Territory of Alaska, shall have jurisdiction for cause shown, in any action brought by the Secretary, represented as provided in the Act of May 4, 1928 (ch. 502, 45 Stat. 490), as amended, to restrain violations of this section or of any rule, regulation, or order of the Secretary adopted to carry out the provisions of this section.

"(f) Any employer who, willfully, violates or fails or refuses to comply with the provisions of subsection (a) of this section, or with any lawful rule, regulation, or order adopted to carry out the provisions of this section, and any employer or other person who willfully interferes with, hinders, or delays the Secretary or his authorized representative in carrying out his duties under subsection (c) of this section by refusing to admit the Secretary or his authorized representative to any place, or to permit the inspection or examination of any employ-

ment or place of employment, or who willfully hinders or delays the Secretary or his authorized representative in the performance of his duties in the enforcement of this section, shall be guilty of an offense, and, upon conviction thereof, shall be punished for each offense by a fine of not less than $100 nor more than $3,000; and in any case where such employer is a corporation, the officer who willfully permits any such violation to occur shall be guilty of an offense, and, upon conviction thereof, shall be punished also for each offense by a fine of not less than $100 nor more than $3,000. The liability hereunder shall not affect any other liability of the employer under this Act.

"(g) (1) The provisions of this section shall not apply in the case of any employment relating to the operations for the exploration, production, or transportation by pipeline of mineral resources upon the navigable waters of the United States, nor under the authority of the Act of August 7, 1953 (ch. 345, 67 Stat. 462), nor in the case of any employment in connection with lands (except filled in, made or reclaimed lands) beneath the navigable waters as defined in the Act of May 22, 1953 (ch. 65, 67 Stat. 29) nor in the case of any employment for which compensation in case of disability or death is provided for employees under the authority of the Act of May 17, 1928 (ch. 612, 45 Stat. 600), as amended, nor under the authority of the Act of August 16, 1941 (ch. 357, 55 Stat. 622), as amended.

"(2) The provisions of this section, with the exception of paragraph (1) of subsection (b), shall not be applied under the authority of the Act of September 7, 1916 (ch. 458, 39 Stat. 742), as amended."

Sec. 2. The term "Secretary" as used in this Act and in amendments made by this Act means the Secretary of Labor.

Approved August 23, 1958.

The Safety and Health Regulations for Longshoring, Part 9 to Sub-title A of 29 Code of Federal Regulations:

"Section 9.52 Specific Requirements

Gear which does not comply with the following requirements shall not be used:

(a) *Preventers.* (1) When preventers are used they shall be of sufficient strength for the intended purpose and secured to the head of the boom independent of working guys except when, in the case of cast fittings, the strength of the fitting exceeds the total strength of all lines secured to it. Any tails, fittings, or other means of making the preventers fast on deck shall provide strength equal to that of the preventer itself.

(b) *Stoppers.* (1) When used, chain topping lift stoppers shall be in good condition, equipped with manila tails, and of a length to allow not fewer than three half-hitches in the chain.

(2) When used, stoppers shall be shackled or otherwise secured in such a manner that links are not bent around fittings. The point of attachment shall be of sufficient strength and so located that the stoppers are reasonably in line with the normal topping lift head at the time the stopper is applied.

(3) When used, patent stoppers of the clamp type shall be suited to the size of the rope used. Clamps shall be in good condition and free of paint and dirt which would prevent their being drawn tight.

(c) *Falls.* (1) The end of the winch fall shall be secured to the drum by clamps, U-bolts, shackles, or some other equally strong method. Fiber rope fastenings shall not be used.

(2) Winch falls shall not be used with fewer than three turns on the winch drum.

(3) Eyes in the ends of falls shall not be formed by knots and, in single part falls, shall not be formed by wire rope clips.

(4) When the design of the winch permits, the fall shall be so wound on the drum that the control mechanism moves in the same direction as the load.

(d) *Heel blocks.* (1) If, because of the position of the winch controls, the winch driver is in the bight formed by the heel block, a preventer of at least ¾-inch wire rope, rove reasonably snug and secured by such means as will develop at least eighty (80) percent of the strength of the rope, shall be rigged, or equally effective means shall be taken to hold the block and fall in the event that the heel block attachments should fail.

(2) If the heel block is not so rigged as to prevent its falling when not under strain, it shall be secured to prevent alternate raising and dropping of the block.

(e) *Coaming rollers.* When used, portable coaming rollers, whether provided by the ship or by the employer, shall be secured by wire preventers in addition to the regular coaming clamps.

(f) *Cargo hooks.* Cargo hooks shall be as close to the junction of the falls as the assembly permits, but in no case farther than 2 feet from it.

"Section 9.2 Scope and Responsibility

(a) The responsibility for compliance with the regulations of this part is placed upon "employers" as defined in Section 9.3(c) of this part."

"Section 9.3 Definitions

(c) The term "employer" means an employer any of whose employees are employed, in whole or in part, in longshoring operations or related employments as defined herein within the Federal maritime jurisdiction on the navigable waters of the United States."

SUBJECT INDEX

	Page
Citations to Opinions Below	1
Statement of the Case	2
Reasons for Denying the Writ	2
A. The Protection of an Individual Longshoreman Is Not Involved in This Case	2
B. The Questions Presented Have Long Been Well Settled	3
C. The Decision of the Court Below Is Not Erroneous	4
Conclusion	5

TABLE OF AUTHORITIES CITED

Cases	Page
Calderola v. Cunard Steamship Company, 279 F. 2d 475, Cert. Den. 364 U.S. 884, 81 S. Ct. 172, 5 L. Ed. 2d 104	3
Cia Maritima, Etc. v. Flanagan Shipping Corp., 308 F. 2d 120	3
Ignatyuk, v. Tramp Chartering Corp., 250 F. 2d 199	3
Orlando v. Prudential SS Corporation, 313 F. 2d 822	3
T. Smith & Son, Inc. v. Skibs A/S Hassel, 362 F. 2d 745	3

IN THE

Supreme Court of the United States

October Term, 1966

No. .....

THOR-DAHL A/S,

Petitioner,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY, a corporation,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari in the Supreme Court of the United States.

Respondent, Crescent Wharf & Warehouse Company, a corporation, respectfully prays that the petition of Thor-Dahl A/S that a writ of certiorari issue to review that part of the final judgment of the Supreme Court of the State of California entered April 22, 1967, in favor of Crescent Wharf and Warehouse Company, a stevedoring company, and against Thor-Dahl A/S, a shipowner, be denied.

CITATIONS TO OPINIONS BELOW.

The opinion of the California District Court of Appeal, Second Appellate District, Division I, is reported at 248 A.C.A. 1045 (1967) and is printed as Appendix A hereto.

STATEMENT OF THE CASE.

On or about December 13, 1961, the petitioner brought its vessel, THORSISLE, to San Diego to be loaded and unloaded by respondent, Crescent Wharf & Warehouse Company. The vessel, THORSISLE, as well as all of its gear, was owned, operated, maintained and repaired exclusively by the petitioner up to said date. At no time did the respondent, Crescent Wharf & Warehouse Company, or any of its employees, maintain or repair any of the vessel's gear.

Immediately upon the commencement of work by the stevedore company aboard the vessel, a piece of the vessel's gear, to wit, a stopper clamp, which had always been maintained and repaired, as well as greased and painted, only by the ship's crew, gave way as the result of a defect which was not only unknown to the stevedore company at all times but was also hidden from view. In addition, the evidence was that the defect which gave rise to the plaintiff's injuries was doubtlessly created by the officers and crew of the ship themselves.

REASONS FOR DENYING THE WRIT.

A. The Protection of an Individual Longshoreman Is Not Involved in This Case.

Counsel for petitioner attempts to convey the impression that the granting of the writ would in some manner serve to protect individual longshoremen from injuries occurring aboard ships. However, at issue are not the rights afforded individual longshoremen, for the longshoreman-plaintiff herein was well protected from the unseaworthiness of the THORSISLE by the General Maritime Law of the United States and in

fact he made a substantial recovery against the ship on the basis of the doctrine of unseaworthiness.

What we are faced with here is the effort of the ship to shift the responsibility it bears for unseaworthy conditions, which it has created in its own equipment, to the stevedore company, which stevedore company did not play any part in the creation of the defective condition and was absolutely unaware of its existence at the time the accident occurred.

B. The Questions Presented Have Long Been Well Settled.

The Courts of Appeals of the United States have repeated again and again that the stevedore's implied warranty of workmanlike service does not place upon the stevedore company a duty to discover defects in the apparatus or equipment furnished by the vessel which defects are not obvious upon a cursory inspection.

Ignatyuk v. Tramp Chartering Corp., 250 F. 2d 199 (2nd Circuit 1957);

Calderola v. Cunard Steamship Company, 279 F. 2d 475 at 478 (2nd Circuit 1960), Cert. Den. 364 U.S. 884, 81 S. Ct. 172, 5 L. Ed. 2d 104;

Cia Maritima, Etc. v. Flanagan Shipping Corp., 308 F. 2d 120 at 125 (5th Circuit 1962);

Orlando v. Prudential SS Corporation, 313 F. 2d 822 at 823 (2nd Circuit 1963);

T. Smith & Son, Inc. v. Skibs A/S Hassel, 362 F. 2d 745 (5th Circuit 1966).

Petitioner, by reference to The Safety and Health Regulations for Longshoring, would seek to impose responsibilities upon the stevedore company which have historically been those of the ship because of the ship's better position to carry them out. Interestingly enough, petitioner in its petition fails to mention Section 9.2(b) of the Regulations which states:

> (b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, *nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.* (Italics ours).

It seems to be practically a matter of which judicial notice could be taken that a shipowner has been, through long-established custom, and now is responsible for the condition of the permanent gear of his own ship which is constantly maintained, repaired, painted and greased only by members of its own ship's crew, and that these regulations do not relieve him of said responsibility which, in the case at bar, was fastened on the shipowner by the jury under the evidence.

C. The Decision of the Court Below Is Not Erroneous.

The stevedore company herein feels that its position is properly and well stated in the decision of the Court of Appeals of the State of California which appears herein in Appendix A. Since that court has so correctly stated the position of respondent-

stevedore company the respondent will not attempt to enlarge upon its position as so enunciated by said court.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

August 18, 1967.

Respectfully submitted,

HENRY E. KAPPLER,
Attorney for Respondent.

Of Counsel:
SIKES, PINNEY & MATTHEW,
JOHN SCOTT MATTHEW.

APPENDIX A.

ARTHUR FLORES,
Plaintiff and Respondent,

- vs -

PACIFIC ISLAND TRANSPORT LINES, et al.,
Defendants and Appellants,

and

CRESCENT WHARF & WAREHOUSE COMPANY,
Cross-Defendant and Respondent.

CIV. NO. 30728

Court of Appeal
Second Dist.
FILED
FEB 27 1967
Clay Robbins, Jr.
Clerk

.....
Deputy Clerk

APPEAL from judgment of the Superior Court of Los Angeles County. John Stuart Frazer, Judge.

Counsel for Appellants: Lillick, Geary, McHose & Roethke, and Lawrence D. Bradley, Jr.

Counsel for Respondent *Arthur Flores:* Magana, Olney, Levy and Cathcart, Mitchell Levy, Ellis J. Horvitz and Morton Minikes.

Counsel for Cross-defendant and Respondent *Crescent Wharf & Warehouse Company:* Sikes, Pinney & Matthew, and John Scott Matthew.

This action was instituted by longshoreman Arthur Flores (hereinafter called Flores) against ship's owner Thor-Dahl A/S (hereinafter called Thor-Dahl) for damages for personal injuries suffered when, in the course of his employment by Crescent Wharf & Warehouse Company (hereinafter called Crescent), Flores was engaged in unloading the vessel Thorsisle. Thor-Dahl filed a cross-complaint for indemnity against

Crescent and the jury returned a verdict of $78,850 in favor of Flores but denied indemnity to Thor-Dahl; judgment was entered accordingly. Because the accident was sustained by a longshoreman aboard a seagoing vessel, this action is controlled by federal maritime law in both its substantive and its procedural aspects. (*Vittone v. American President Lines,* 228 Cal. App.2d 689, 693; *Kermarec v. Transatlantique,* 358 U.S. 625; *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 409.)

Appellant Thor-Dahl contends that the jury was improperly instructed concerning the nature and extent of Crescent's duty as a stevedore company under contract to unload Thorsisle with respect to its implied warranty of workmanlike service. It is Thor-Dahl's further contention that this instruction adversely influenced the jury in its deliberations on the issue of damages as evidenced by the fact that it failed to reduce the award to accommodate for the contributory negligence of Flores. The pivotal issue herein is the extent of the responsibility owed by the stevedore company and its employee to discover and remedy latent defects in the ship's equipment, unknown to the vessel's crew or the stevedore company beforehand.

The vessel Thorsisle was a Norwegian ship owned and operated by Thor-Dahl and engaged in carrying cargo and passengers between ports on the west coast of the United States and islands in the South Pacific. Flores was 34 years old and had, at the time of the accident, about seven years' experience in all phases of work as a longshoreman. When he reported to the longshoremen's Union Hall for a work assignment on December 13, 1961, he was dispatched to the employ of Crescent to assist as a winch-driver in unloading the

Thorsisle. According to custom, he reported to the hatch boss at the vessel, and was assigned to one of the winches to perform familiar duties. His first task in preparation for the unloading operation was to lower the yard boom from the upright position in which the ship's crew had previously placed it.

The boom is fitted with a topping lift cable which raises the boom from the cradle in which it rests while the vessel is at sea and holds it in an elevated position in anticipation of its use in port. When the boom is so elevated, the topping lift cable is wrapped in a few circles and then in figure eights around cleats on the deck floor to keep the cable taut. In order to lower the boom by means of the winch the topping lift cable must be transferred from the cleats to the gypsy head of the winch. Since there is always a strain on the topping lift cable whenever the boom is out of its cradle, a stopper is provided at each boom to hold the topping lift cable temporarily in place while the cable is transferred from the gypsy head to the cleats or vice versa. These stoppers may be clamp-type, as were those on the Thorsisle, with the two halves hinged at one end, a wing or butterfly nut at the other end, and a rifled groove down the middle of each clamp face so that when the topping lift cable is in place it fits snugly into the groove.

Topping lift cables are comparatively heavy, stiff cables with a natural tendency to spring off the cleats so the man handling the cable must, as a precaution, hold the cable taut throughout the transfer from cleats to gypsy head. Moreover, there is always the possibility that the topping lift cable will not be held firmly by the rifling in the groove of the stopper and the man who lowers the boom must test the stopper. There is no test

or inspection that can be made beforehand to determine that the stopper will hold the cable once it is undone from the cleats. Instead, the stopper is tested in use by placing the cable in the stopper, then tightening the stopper by turning the butterfly lever, thereafter removing the figure eights from the cleats, and finally loosening or "surging" the cable slightly into the stopper to see if it holds. If the stopper holds properly, the topping lift cable is taken off the cleats and transferred to the gypsy head and the boom is lowered by means of the winch. In the event the stopper fails to hold, the longshoreman must pull hard on the cable and attempt to return the figure eights to the cleats. The longshoreman who performs this operation must work alone up to the point where the cable has been transferred to the winch.

In the instant case, Flores testified that he tightened the stopper by turning the butterfly lever as hard as he could until the faces of the stopper appeared to be pressing tightly against the cable and then proceeded to remove the small line which is tied about the cleats above the figure eights to secure the cable. He thereafter removed the figure eights of cable from the cleats and surged the cable to make sure the stopper would hold, but the stopper did not hold and the cable started to run rapidly through the stopper. Flores tried to stop the running cable by pulling back hard, but because of the limited work area he could not gain the necessary leverage and, as he could not prevent his hands from being drawn to the cleats, he let go of the cable which started to snake in and out and finally hit him, throwing him to the deck of the ship. He testified that he had time in the instant before he fell to notice that the butterfly lever on the stopper was spinning backwards.

Some five or ten minutes after the accident one of Flores' fellow longshoremen aboard the Thorsisle examined the stopper clamp and observed that the inside face of the clamps had a build-up of paint drippings about a quarter of an inch thick and a substantial accumulation of heavy grease and paint chips but when he looked later the same day these faces had been scraped free of the excess paint and grease. Subsequent testimony of this witness and the ship's then chief officer established that the accumulation of paint and grease on the inside face of stopper clamps aboard a vessel is a recognized maritime hazard and one that the ship's crew customarily takes precaution to avoid because this prevents the stopper from holding well.

Flores suffered, as a result of the accident, a severe compound fracture of his leg which required emergency surgery in which a plate and four screws were inserted to hold his leg straight. The plate was later removed and a metal pin inserted across the fracture while, at the same time, grafts were made of bone from Flores' other hip to encourage new bone formation. Finally, after spending some 22 months in a hip length cast, Flores was able to return to work in a limited capacity with some attendant pain and difficulty.

In maritime cases the rule of comparative negligence applies, and Thor-Dahl claims that a new trial should be granted because the jury did not reduce the amount of the award to reflect the alleged contributory negligence of Flores, thus rendering the verdict excessive as a matter of law. The jury was justified in concluding, however, from substantial evidence at the trial, that Flores' negligence, if any, was not a contributing factor in the accident.

Flores testified that before he tested the stopper he inspected it visually without opening the clamps and observed nothing wrong with it. He further testified that the work area, which was only 18 inches wide, seemed small but, though he had frequently performed the stopper test before, he had never experienced a stopper failure and did not realize the significance of or report this space inadequacy. Since the evidence amply sustains the inference that the unseaworthy stopper condition caused the accident, and the ship owes to both seamen and longshoremen employed about the vessel an absolute duty to maintain for their use appropriate and seaworthy equipment (*Seas Shipping Co. v. Sieracki*, 328 U.S. 85), the jury was justified in its implied finding that even if Flores were in some way negligent, his conduct did not constitute a proximate cause of the accident. As appellant condedes, there is nothing specific in the record from which it can be determined whether or not the jury found Flores contributorily negligent, and appellant presumes merely that since provable damages were substantially lower than the verdict, the jury failed to apply the court's instruction to reduce them in proportion to Flores' negligence.

We perceive no sound basis for appellant's assumption that the jury defected in its responsibility to consider Flores' comparative negligence, if any, or to segregate as directed the instructions given by the court and apply only those appropriate in resolving the respective issues. We are not impressed with appellant's premises that the amount of the award, in and of itself, discloses a misapplication of law by the jury.

We find herein, moreover, no miscarriage of justice with respect to the jury's verdict that Thor-Dahl is not entitled to indemnity. The United States Supreme Court, in a landmark decision (*Ryan Co. v. Pre-Atlantic Corp.*, 350 U.S. 24), imposed upon stevedoring companies generally an implied warranty of workmanlike service and the liability of Crescent must be determined in this contest. The jury was, nonethelss, justified in inferring from the evidence either that no breach thereof occurred or that, in any event, defective performance by Crescent did not proximately cause the accident.

Testimony disclosed that the custom and practice among San Diego longshoremen at the time of the accident was to make a visual inspection of the ship's gear and proceed to use it if it appeared to be in good condition without first taking it apart or examining it for hidden or latent defects. This accords with Flores' testimony that he observed no gross defects in the stopper before its use. The law would impose an untoward burden on the stevedore company to require that its employees dismantle and inspect the ship's equipment for latent defects prior to use.

Appellant refers to rule 9.52(b)(3) of the Safety and Health Regulations for Longshoring (Code of Federal Regulations, volume 29, part 9 to sub-title A, effective March 21, 1960, and in force at the time of the accident) which provides that stopper clamps shall not be used unless they appear to be in good condition and free of paint and dirt which would prevent their being drawn tight, but we have been referred to no decision which has interpreted this regulation to impose on the stevedore company the duty to discover this condition by taking the clamps apart.

Appellant observes that the shipowner's breach of its duty to maintain a seaworthy vessel no longer constitutes an absolute bar to indemnity from the stevedore company. Decisions subsequent to *Ryan* ". . . have made clear that the stevedore's obligation to perform with reasonable safety extends not only to the stowage and handling of cargo but also to the use of equipment incidental thereto, Weyerhaeuser S.S. co. v. Nacirema Operating Co., 335 U.S. 563, 78 S.Ct. 438, including defective equipment supplied by the shipowner, Crumady v. The J. H. Fisser, supra, cf. Waterman S.S. Corp. v. Dugan & McNamara, Inc., 364 U.S. 421, 5 L.ed.2d 169, 81 S Ct 200, and that the shipowner's negligence is not fatal to recovery against the stevedore." (*Italia Societa v. Oregon Stevedoring Co., Inc.*, 376 U.S. 315, 319-320.)

The shipowner is entitled to relief where the stevedore company induces the accident by bringing into play the hazardous condition (*Crumady v. "Jochim Hendrick Fisser"*, 358 U.S. 423; *Weyerhaeuser S.S. Co. v. Nacirema Co.*, 355 U.S. 563; *Pettus v. Grace Line, Inc.*, 305 F.2d 151) The application of this principle is, however, limited to circumstances where the stevedore company knew and recognized the existence of the defective condition, and the use of unseaworthy equipment despite such knowledge constituted the fatal breach. (*Crumady v. "Jochim Hendrick Fisser", supra; Matson Terminals, Inc. v. Caldwell*, 354 F.2d 681.) We have been referred to no decision which extended protection to the shipowner when the latent defect was unknown to both the shipowner and the stevedore company. The evidence, moreover, does not command the inference that the stevedore company in

the reasonable and workmanlike performance of its services should have discovered this dangerous latent condition prior to the operational test of the stopper. Appellant concedes that "there is no other conceivable way (except by taking apart the stopper) in which the stevedore company could . . . make certain the stopper was free of paint and dirt which would prevent it from being drawn tight," but urges that a breach of workmanlike service may be presumed from the mere fact that an accident resulted in the performance of the customary test. Even if we agreed, we would not be entitled to thus invade the province of the jury.

In this regard appellant complains of the following instruction, clearly limited in applicability to the case for indemnity against the stevedore company: "You have been instructed that the stevedore company owes a duty to the shipowner to conduct its operations, through the exercise of ordinary care, in a reasonably safe manner.

"However, the stevedore company does not have a duty to the ship to discover and remedy a hidden or latent defect of which it was not informed and which is not obvious upon cursory inspection." Appellant strongly objects to the adjective "cursory" as inadequate to describe the duty of inspection which the stevedore company bears under its contractual relationship with the shipowner. The selected language taken out of context may imply a superficial inspection generally inappropriate to circumstances so fraught with potential hazard as the unloading of a ship's heavy cargo but this does not compel the conclusion that any miscarriage of justice occurred in the trial. This terminology is, moreover, supported by at least two recent decisions of the United States Court of Appeals. "We hold that an im-

plied warranty of workmanlike performance by a stevedore does not place upon him a duty to discover defects in the apparatus or equipment furnished by the vessel being loaded or unloaded which are not obvious upon a cursory inspection." (*Ignatyuk v. Tramp Chartering Corp.*, 250 F.2d 198, 201; relied upon in *Cia Maritima Del Nervion v. James J. Flanagan Ship. Corp.*, 308 F.2d 120.)

The accident resulted from a hazardous and latent unseaworthy condition of the vessel, which it is the shipowner's responsibility to maintain. While the negligence of the shipowner may not bar its recovery from the stevedore company (*Italia Societa per Azioni de Navigasione v. Oregon Stevedoring Co., supra*, 376 U.S. 315) still the stevedore company should not be charged on its warranty by reason of failure to make a cautious inspection of the ship's gear (*Cia Maritima Del Nervion v. James J. Flanagan Ship. Corp., supra*, 308 F.2d 120). It is only those defects which have been in fact observed by the stevedore company for which it may be responsible if it uses the equipment thereafter without ascertaining that the condition has been remedied. (*T. Smith & Son, Inc. v. Skibs A/S Hassel*, 362 F.2d 745.)

We are compelled to conclude that the language of the court in *Ignatyuk v. Tramp Chartering Corp., supra*, describes the duty of the stevedore company with sufficient accuracy from a practical perspective. This is true for the significant reason that any inspection which would impose upon the stevedore the duty to dismantle the ship's gear would be impractical and prohibitive in cost to the shipowner itself.

"'Certainly the shipowner would not only object but would prohibit the dismantling of every piece of ship's gear, such as winches, lights, etc. in a professed effort by the stevedoring company to ascertain whether or not the ship's own appurtenances were seaworthy.' *Ray v. Compania Naviera Continental, S.A.*, D.Md. 1962, 203 F. Supp. 206, 211." (*Cia Maritima Del Nervion v. James J. Flanagan Ship. Corp., supra*, p. 125.)

The judgment is affirmed.

FOURT, J.

We concur:

WOOD, P. J.

LILLIE, J.

TOPICAL INDEX

Page

1. Respondent's Statement of the Case says that a piece of vessel's gear, a stopper clamp, "gave way" as a result of a defect which was "hidden from view" 1

2. Respondent would have this court believe that protection of individual longshoremen is not involved in this case 3

3. The questions presented are not well settled as respondent states 4

4. The decision of the court below is erroneous and respondent has stated nothing in support of the decision 4

Conclusion 6

TABLE OF AUTHORITIES CITED

Miscellaneous

Safety and Health Regulations for Longshoring

Section 9.52 5

Section 9.52(b)(3) 3

IN THE

Supreme Court of the United States

October Term, 1967

No. 398

THOR-DAHL A/S

Petitioner,

vs.

CRESCENT WHARF & WAREHOUSE COMPANY, a corporation,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES

PETITIONER'S REPLY BRIEF

Petitioner submits this reply in the interest of clarifying several gross misconceptions in Respondent's Brief in Opposition to Petition for Writ of Certiorari in the Supreme Court of the United States. The points which petitioner believes should be clarified are set forth in chronological order below:

1. *Respondent's Statement of the Case says that a piece of vessel's gear, a stopper clamp, "gave way" as a result of a defect which was "hidden from view".* The stopper clamp did not give way or break. The topping

lift cable merely slipped through the stopper clamp when the stevedoring company lost control of the cable as it surged or eased off on the cable to shift the strain from the deck cleats to the stopper. The cable could have slipped through the clamps only because the stevedoring company did not properly tighten the butterfly nut on the clamps or because a build-up of paint and grease on the faces of the clamps prevented the clamps from properly closing and gripping the cable.[1] Since the jury found against the shipowner, it is conceded for purposes of this appeal that paint and grease prevented the clamps from properly closing.

Further, paint and grease on the face of the stopper clamp would not be "hidden from view" if one looked closely. True, foreign matter between the faces of the clamps would not be "obvious upon a cursory inspection," particularly when such inspection was limited to merely looking at the outside of the clamps as was done in this case.[2] However, by looking closely or taking a few seconds to back off a couple of turns of the butterfly nut on the clamps and swing open the clamps, anything

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[1]At trial, a retired United States Coast Guard officer with many years experience investigating marine accidents, testified that he had inspected and tested the stopper about 24 hours after the accident and found "absolutely nothing wrong with it". R.Tr. 377. There was extensive evidence that the stopper was in good working condition before and after the accident without any change or repairs having been made to the stopper. R.Tr. 274-6, 290, 323, 362-3, 393, 407. The stevedoring company's contention has always been that a build up of paint and grease on the faces of the clamps prevented them from properly closing and gripping the cable. R.Tr. 120, 152.

[2]R.Tr. 51.

between the faces of the clamps would readily become apparent.

2. *Respondent would have this court believe that protection of individual longshoremen is not involved in this case.* Respondent confuses legal rights of the longshoreman after he has been injured with protecting him from injury in the first instance. Protection of the longshoreman from injury is definitely involved in this case and the question presented is of critical importance to the proper administration and achievement of the objectives of the Longshoremen's and Harbor Workers' Safety Program, namely preventing accidents. At issue is whether the stevedoring company, the party best situated to reduce the accident rate among longshoremen, shall be held responsible and deemed to have breached its warranty of workmanlike service for its failure to comply with federal safety regulations. Equally at issue is whether a state court can lessen or alter safety requirements established by the federal government pursuant to act of Congress.

This case presents a classic example of an accident which would have been prevented if the stevedoring company had complied with the safety regulations.[3] The stevedoring company would have discovered the paint and grease between the faces of the clamps if it had performed its job in a workmanlike manner and complied

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[3]E.g., "Clamps *shall be* in good condition and free of paint and dirt which would prevent their being drawn tight." Safety and Health Regulations for Longshoring, Section 9.52(b)(3). (*Emphasis supplied.*)

with the safety regulations. The ship's crew regularly used the stopper and only about 12 hours prior to the accident had topped the boom, a job that could not have been performed unless the stopper held properly.[4] The ship had no indication whatsoever that the stopper would not hold the cable. The wisdom of the safety regulation involved which has singled out stopper clamps for special treatment, specifically placing responsibility on the stevedoring company to make certain that clamps are "in good condition and free of paint and dirt which would prevent their being drawn tight," is vividly demonstrated by the accident in this case.

3. *The questions presented are not well settled as Respondent states.* Respondent has not cited one case which involves or even mentions the federal safety regulations. Without exception, all of the cases cited by Respondent are inapposite. None of the cases decide, nor even discuss, whether the absolute duty imposed on the stevedoring company by the safety regulations extends the stevedore's duty in certain instances, such as in respect to stopper clamps,[5] beyond that of making a "cursory inspection". Thus, the court is presented with a novel and important question.

4. *The decision of the court below is erroneous and Respondent has stated nothing in support of the decision.* Since the federal safety regulations specifically require the use of "clean clamps" and not merely a "cur-

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[4]R.Tr. 282, 362-3.

[5]See Footnote 3, *supra*.

sory inspection," and since a cursory inspection will not reveal the presence of paint and dirt between the faces of the clamps, *a fortiori* a decision upholding a jury instruction advising the jury that only a cursory inspection is required is manifestly erroneous. The cases cited by Respondent[6] that have stated that a cursory inspection is sufficient have apparently led the courts below to believe such a rule applies even in a situation expressly covered by the safety regulations, despite the absolute requirements of the regulations to the contrary[7] and the clear language therein that "Gear which does not comply with the following requirements shall not be used".[8]

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[6]None of which concerned the Safety and Health Regulations for Longshoring.

[7]See Footnote 3, *supra*.

[8]Safety and Health Regulations for Longshoring, Section 9.52. See Appendix B, p. 29, of Petition for Certiorari.

CONCLUSION

In view of the importance of the issues and the need for a decision on the subject, this petition for a Writ of Certiorari should be granted.

August 26, 1967.

Respectfully submitted,

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